United Nations A/AC.254/4/Add.1/Rev.3

General Assembly

Distr.: General
22 November 1999

Original: English

Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
Sixth session
Vienna, 6-17 December 1999
Item 3 (a) of the provisional agenda*
Consideration of the additional legal instruments: draft instrument against illegal trafficking in and transporting of migrants, with particular emphasis on articles 7-19

Revised draft Protocol against the Smuggling[1] of Migrants by Land, Air and Sea,[2] Supplementing the United Nations Convention against Transnational Organized Crime[3]

* A/AC.254/20.

[1] The term "smuggling" is used throughout the text in the light of action taken by the Commission on Crime Prevention and Criminal Justice at its eighth session regarding the draft protocol addressing trafficking in women and children. During the discussion at the first session of the Ad Hoc Committee, several delegations raised the issue of the translation of the term "smuggling" into languages other than English and the problems that it created. Attention will, therefore, be paid to identifying the appropriate term to be used in languages other than English. That will be done in the glossary of terms, which the Secretariat is currently preparing. Existing texts on the subject, such as General Assembly resolutions 48/102 and 51/62 and Economic and Social Council resolution 1995/10, might be useful in this regard.

[2] In its resolution 53/111, the General Assembly requested the Ad Hoc Committee, *inter alia*, to discuss the elaboration of an international instrument addressing illegal trafficking in and transporting of migrants, including by sea. The Ad Hoc Committee at its first session was of the view that focusing on illegal trafficking and transporting by sea would be too restrictive.

[3] The text of the present revised draft Protocol is based on a proposal submitted by Austria and Italy containing draft elements for an international legal instrument against illegal trafficking and transport of migrants (A/AC.254/4/Add.1). It reflects, *inter alia*, all comments and proposals made or submitted by delegations at the first session of the Ad Hoc Committee, held in Vienna from 19 to 29 January 1999.

Preamble[4]

The States Parties to this Protocol,

[(a) *Taking note* of the United Nations Convention against Transnational Organized Crime,]

(b) *Concerned* about the rapid development of the smuggling of migrants,

[(c) *Alarmed* by the significant increase in the activities of transnational criminal organizations that make illicit profits by smuggling migrants across national boundaries,]

[(d) *Recognizing* that transnational criminal organizations also use the smuggling of migrants to further numerous other criminal activities, thus bringing great harm to the States concerned,]

(e) *Concerned* that the smuggling of migrants may lead to the misuse of established procedures for immigration, including those for seeking asylum,[5]

[(f) *Also concerned* that the smuggling of migrants can endanger the lives or security of the individual migrants involved and entails great expense for the international community, including the costs of rescue, medical care, food, housing and transportation,]

[(g) *Reaffirming* that States should give high priority to preventing, combating and eradicating the smuggling of migrants because of the links of such activity with transnational organized crime and other criminal activities,]

[(h) *Convinced* that combating the smuggling of migrants requires international cooperation, the exchange of information and other appropriate measures at the national, regional and global levels,]

(i) *Also convinced* that, to counter this phenomenon, a global approach, including socio-economic measures, is necessary,

(j) *Further convinced* of the need to provide migrants with humane treatment and full protection of their human rights,

(k) *Convinced* of the need for a comprehensive international legal instrument to combat all aspects of the transnational smuggling of migrants by land, air and sea,

(l) *Stressing* the importance of full compliance by States with their obligations under the provisions of the 1951 Convention[6] and the 1967 Protocol,[7] and affirming that the present Protocol does not affect the protection afforded under the terms of the 1951 Convention and the 1967 Protocol and other provisions of international law,

(m) *Recalling* the work of the International Maritime Organization concerning unsafe practices associated with trafficking in or transporting of illegal migrants by sea, in particular the work of the Maritime Safety Committee, which approved the interim

---

[4] Several delegations were of the view that the preamble should contain provisions to address the underlying causes of the illegal movement of people and to reaffirm the principle of free movement of people. Most delegations were of the view that it would be most useful to consider the preamble after the finalization of the text of the substantive articles.

[5] Several delegations were of the view that the question of refugees should also be addressed (see paragraph 2 of article 5 below).

[6] United Nations, *Treaty Series*, vol. 189, No. 2545.

[7] Ibid., vol. 606, No. 8791.

measures for combating unsafe practices associated with the trafficking or transport of migrants by sea,[8]

(n) [*Text on decisions of the International Civil Aviation Organization to be added*],

[(o) *Reaffirming* respect for the sovereignty and territorial integrity of all States, including their right to control immigration flows,]

(p) *Desiring* to supplement the United Nations Convention against Transnational Organized Crime by a protocol directed specifically against the smuggling of migrants, as a first step towards the eradication of this crime,[9]

[(q) *Declaring* that such an instrument must concentrate on crime prevention and criminal justice, in particular the activities of those who organize and facilitate the smuggling of migrants,]

Have agreed as follows:

I. General provisions relating to the smuggling of migrants by land, air and sea

Option 1

Article 1

Relation to the United Nations Convention against Transnational Organized Crime

This Protocol supplements the United Nations Convention against Transnational Organized Crime (hereinafter referred to as "the Convention"), done at [...], and, as regards the States Parties to this Protocol, those two instruments shall be read and interpreted together as one single instrument.[10]

[8] One delegation suggested that the International Maritime Organization circular containing the interim measures (MSC/Circ.896) could be a useful source of inspiration, but that the drafting of the text of the present instrument should not necessarily be conditioned by that circular.

[9] One delegation suggested that the preamble should be supplemented with provisions stressing the effects of illegal trafficking or smuggling on national security, as well as the need to strengthen cooperation and coordination between States.

[10] For the discussion on the relationship between the draft Convention and the international instruments whose drafting has been entrusted to the Ad Hoc Committee pursuant to General Assembly resolutions 53/111 and 53/114, see also the report of the Ad Hoc Committee on its first session (A/AC.254/9). At the fourth session of the Ad Hoc Committee, some delegations expressed their preference for option 1 over option 2, while other delegations were of the view that it was too early to decide which option to take. One delegation suggested that the principle of *mutatis mutandis* application, as reflected in option 2, should be included in the text of option 1. Another delegation suggested that the article should be moved to the chapter on final provisions.

Option 2

Article 1

Application of the United Nations Convention against Transnational Organized Crime

The provisions of articles [...] of the United Nations Convention against Transnational Organized Crime (hereinafter referred to as "the Convention"), done at [...], shall also apply *mutatis mutandis* to this Protocol.

Article 2[11]

Definitions

1. For the purposes of this Protocol, the following definitions shall apply:

(a) "Smuggling of migrants" shall mean the intentional procurement[12] for profit[13] of the illegal entry[14] of a person into and/or illegal residence[15] of a person in a State of which the person is not a national or a permanent resident;[16, 17]

(b) "Illegal entry" shall mean the crossing of borders without complying with the necessary requirements for legal entry into the receiving State;

(c) "Illegal residence" shall mean residence in the territory of a State without complying with the necessary requirements for legal residence in the State concerned;[18]

---

[11] The articles on definition (article 2) and purpose (article 3) will need to be reviewed in the light of choices made with regard to options that appear later in the text. In addition, those articles will need to be reviewed to ensure their consistency with the draft Convention.

[12] One delegation considered the concept of "procurement of illegal entry" to be problematic. In the view of that delegation, it would be better to make reference to complicity in and aiding and abetting the violation of national migration laws. At the fourth session of the Ad Hoc Committee, one delegation suggested that the words "intentional procurement" should be replaced by the words "intentional and repeated procurement" or, alternatively, by "intentional and organized procurement"; however, other delegations opposed that suggestion.

[13] At the fourth session of the Ad Hoc Committee, one delegation suggested replacing the word "profit" by the words "proceeds of crime". Some delegations suggested deleting the word "profit", while other delegations were in favour of retaining it. At the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations suggested that the element of profit should be transferred to article 4, paragraph 5, relating to aggravating circumstances. If the word "profit" would be subsequently deleted from the text, the definition of "profit" in subparagraph 1 (d) of this article would also be deleted.

[14] At the informal consultations held during the fifth session of the Ad Hoc Committee, suggestions were made regarding the replacement of the words "illegal entry" by the words "irregular or non-documented entry" or, alternatively, the replacement of the word "illegal" by the word "irregular". Several delegations expressed concern that "irregular" did not cover the same conduct as "illegal".

[15] At the fourth session of the Ad Hoc Committee and at the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations suggested deleting the words "illegal residence"; however, others were in favour of retaining those words.

[16] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the words "of a person in a State of which the person is not a national or a permanent resident".

[17] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested adding the phrase "or any other procedure for an illegal stay in violation of the national law of a State Party" at the end of this subparagraph.

[18] At the fourth session of the Ad Hoc Committee, some delegations suggested deleting this subparagraph if the words "illegal residence" were to be deleted from subparagraph 1 (a) of this article (see also footnote 15 above).

(d) "Profit" shall mean any property, benefit or advantage obtained directly or indirectly[19] as a result of the smuggling of a migrant,[20] including the expectation of or future participation in criminal[21] activities by the migrant;[22, 23]

(e) "Fraudulent travel or identity document"[24] shall mean any travel or identity document:[25]

(i) That has been made, falsified or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued[26] or obtained through misrepresentation, corruption,[27] duress or other unlawful manner;[28] or

(iii) That is being used by a person other than the rightful holder;[29]

(f) "Vehicle" shall mean any conveyance that may be used for transportation by land or air;[30] and

(g) "Vessel" shall mean every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.[31]

---

[19] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the rest of this subparagraph after the word "indirectly".

[20] At the fourth session of the Ad Hoc Committee, the deletion of the words "as a result of the smuggling of a migrant" was suggested.

[21] At the fourth session of the Ad Hoc Committee, some delegations suggested replacing the word "criminal" by the word "illegal".

[22] At the fourth session of the Ad Hoc Committee, several delegations suggested that the definition of "profit" should reflect the discussions of the Ad Hoc Committee on article 2 *bis* of the Convention regarding financial or other material benefit.

[23] At the fourth session of the Ad Hoc Committee, some delegations suggested deleting the words "including the expectation of or future participation in criminal activities by the migrant".

[24] At the fourth session of the Ad Hoc Committee, some delegations suggested that the draft Protocol should not contain definitions of fraudulent travel or identity documents.

[25] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested either deleting this subparagraph or moving it to article 4, while other delegations were in favour of retaining it.

[26] At the fourth session of the Ad Hoc Committee, one delegation suggested that the word "altered" should be inserted after the word "issued".

[27] At the fourth session of the Ad Hoc Committee, some delegations suggested deleting the word "corruption".

[28] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting this subparagraph.

[29] At the fourth session of the Ad Hoc Committee, some delegations suggested deleting this subparagraph, while another delegation recommended moving it to article 4.

[30] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation raised questions about the content of the term "vehicle". Another delegation suggested that the word "aircraft" should be defined separately.

[31] The source of the definition of "vessel" is the definition of "ship" provided in paragraph 2 of the interim measures (MSC/Circ.896, annex). At the fourth session of the Ad Hoc Committee, several delegations suggested that, for the wording of the interim measures, the United Nations Convention on the Law of the Sea should be applied. It was also suggested that the words "naval auxiliary or other vessel owned or

2. For the purposes of this Protocol, each State Party shall consider the illegal entry into or illegal residence in the territory of any other State Party equal to illegal entry into or illegal residence in its own territory.[32]

Article 3[33]

Purposes

The purposes of this Protocol are:

(a) To establish the smuggling of migrants as a criminal offence under the respective national laws of States Parties [, when involving an organized criminal group,[34] as defined in the Convention]; and

(b) To promote and facilitate cooperation among States Parties to prevent, investigate and prosecute the crime of smuggling migrants.[35]

---

operated by a Government and used, for the time being, only on government non-commercial service" should be replaced by the words "or any other government ship".

[32] At the fourth session of the Ad Hoc Committee, one delegation suggested that this subparagraph should be either deleted or moved to article 4 (Criminalization) or article 6 (Jurisdiction). At the informal consultations held during the fifth session of the Ad Hoc Committee, several delegations stated that this paragraph needed to be clarified.

[33] See footnote 9 above. Some delegations were of the view that the Ad Hoc Committee would need to consider whether to link the offences covered by this Protocol with organized crime and, if so, how.

[34] At the informal consultations held during the fifth session of the Ad Hoc Committee, it was recommended to replace the words "when committed in the context of transnational organized crime", contained in the previous version of the draft Protocol (A/AC.254/4/Add.1/Rev.2), with the words "when involving an organized criminal group". This formulation is provisional, as it will depend on the outcome of negotiations regarding definitions in the draft Convention (see also footnote 11 above).

[35] At the fourth session of the Ad Hoc Committee, some delegations suggested that the words "when life, safety or freedom of the migrant is at risk" be inserted after the word "migrants". Some delegations suggested that this subparagraph should be focused on the prevention, investigation and prosecution of the smuggling of migrants by organized criminal groups. It was also suggested that this subparagraph should be moved before subparagraph (a) of this article. It was further suggested that the words "as well as to protect the victim of such smuggling, including their human rights" should be inserted at the end of this subparagraph. This last matter was also discussed during the informal consultations held during the fifth session of the Ad Hoc Committee. The delegation of Mexico suggested that the protection of victims should be included either in this article or as a new article 1 *bis* (see also A/AC.254/L.61). Several delegations supported the proposal, while other delegations considered that human rights should be covered under article 5. One delegation suggested that, as an alternative, subparagraph (b) of this article could be combined with article 5.

Article 4

Criminalization

Option 1[36]

1. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as a criminal offence the smuggling of migrants[37] [, when committed in the context of transnational organized crime, as defined in the Convention].[38]

2. States Parties that have not yet done so shall[39] adopt the necessary legislation or other measures to establish as a criminal offence [, when committed in the context of transnational organized crime, as defined in the Convention]:[40]

(a) The intentional making, procuring or providing of a fraudulent travel or identity document; and

(b) Knowing that a travel or identity document is fraudulent:[41]

(i) Using, possessing,[42] dealing with or acting on[43] such a document; and

(ii) Causing a fraudulent travel or identity document to be used, possessed, dealt with or acted on.

---

[36] At the informal consultations held at the fifth session of the Ad Hoc Committee, the majority of the delegations were in favour of deleting this option, while one delegation suggested retaining paragraph 1 of this option.

[37] One delegation suggested that not only individuals but also legal entities (legal persons) should be covered because of the potential involvement of travel companies or corporations.

[38] This formulation is provisional, as it will depend on the outcome of the negotiations regarding definitions in the draft Convention (see also footnote 11 above). At the fourth session of the Ad Hoc Committee, many delegations suggested removing the brackets so as to stress that the Protocol should commit States Parties to criminalizing the smuggling of illegal migrants only in the context of transnational organized crime. Other delegations preferred to retain the brackets on the grounds that there was no definition of transnational organized crime in the Convention. At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested that the words "transnational organized crime" should be kept in brackets and that the words "organized criminal group" should be inserted in brackets next to those words.

[39] At the fourth session of the Ad Hoc Committee, one delegation suggested replacing the word "shall" by "may".

[40] This formulation is provisional, as it will depend on the outcome of the negotiations regarding definitions in the draft Convention (see also footnote 11 above). At the fourth session of the Ad Hoc Committee, many delegations suggested removing the brackets, while some preferred to retain them (see footnote 38 above). Several delegations suggested merging paragraph 2 with paragraph 1 of this article, while one delegation recommended moving this paragraph to article 2. Another delegation suggested deleting this paragraph.

[41] At the fourth session of the Ad Hoc Committee, many delegations suggested that this subparagraph be deleted, while other delegations suggested adding the phrase "for the purpose of smuggling another person across borders".

[42] At the fourth session of the Ad Hoc Committee, one delegation suggested inserting the word "trading" after the word "possessing".

[43] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the words "dealing with or acting on".

Option 2[44]

1. States Parties that have not yet done so shall adopt the necessary legislative or other measures to establish the following conduct as criminal offences when committed by an organized criminal group:

(a) The smuggling of migrants; and

(b) The intentional:[45]

(i) Making, procuring or providing of a fraudulent travel or identity document;

(ii) Using, possessing,[46] dealing with or acting on such a document; or

(iii) Causing such a document to be used, possessed, dealt with or acted on, for the purpose of smuggling migrants.[47, 48]

3. Each State Party shall also adopt the necessary legislation or other measures to establish as a criminal offence the following conduct:

(a) Attempting to commit an offence set forth in paragraphs 1 and 2 of this article;[49]

(b) Participating as an accomplice[50] in an offence set forth in paragraphs 1 and 2 of this article;[51]

(c) Organizing or directing others to commit an offence set forth in paragraphs 1 and 2 of this article;[52] or

---

[44] At the fourth session of the Ad Hoc Committee, South Africa suggested including this wording as an option in the main body of the text, in order to combine paragraphs 1 and 2 of this article.

[45] At the informal consultations held during the fifth session of the Ad Hoc Committee, several delegations suggested that this subparagraph should clearly link such conduct to the organized criminal group so that the migrants would not be criminalized. One delegation suggested deleting this subparagraph.

[46] At the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations suggested that merely "possessing" such a document should not be criminalized.

[47] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested rephrasing this subparagraph to read as follows: "Causing a third party to use, possess, deal with or act on such a document for the purpose of smuggling migrants".

[48] At the informal consultations held during the fifth session of the Ad Hoc Committee, several delegations supported the proposal submitted by Canada and the United States (A/AC.254/L.76). The proposals submitted by India (A/AC.254/L.58) and the Russian Federation were also supported by several delegations. The proposal by the Russian Federation read as follows: "States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as criminal offences the activities of organized criminal groups relating to the organization, procuring and actual effectuation of the smuggling of migrants."

[49] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested combining subparagraphs 3 (a), (b) and (c).

[50] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the words "as an accomplice". At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation opposed the deletion of those words.

[51] Some delegations were of the view that, notwithstanding paragraph 6 of this article, the concept of participation required clarification.

[52] At the fourth session of the Ad Hoc Committee, some delegations suggested inserting the words "or attempting to commit such an offence" after the word "article" and deleting subparagraph (a).

[(d) In any other way contributing to the commission of an offence set forth in this article by a group of persons acting with a common purpose; such contribution shall be intentional and shall either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned].[53]

4. States Parties shall make the commission of the offences in this article liable to sanctions that take into account the grave nature of the offences.

Option 1[54]

5. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as an aggravating circumstance the smuggling of migrants in circumstances that endanger, or are likely[55] to endanger, the life or safety of persons whose illegal entry is procured or intended.[56]

6. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as an aggravating circumstance the exploitation or inhuman or degrading treatment of persons whose illegal entry is procured or intended.[57]

Option 2

5. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as an aggravating circumstance the smuggling of migrants in circumstances:

(a) That endanger, or are likely to endanger, the life or safety of persons whose illegal entry is procured or intended; or

(b) That entail inhuman or degrading treatment[58] of such persons.[59]

---

[53] This subparagraph was proposed by the delegations of Canada and the United States. The language is taken from article 2, paragraph 3 (c), of the International Convention for the Suppression of Terrorist Bombings (General Assembly resolution 52/164, annex) and is intended to ensure that the Protocol will be broad enough to encompass both conspiracy and participation in a criminal organization. At the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations stated that this subparagraph needed to be clarified.

[54] At the informal consultations held during the fifth session of the Ad Hoc Committee, there was general agreement that this option should be deleted.

[55] At the fourth session of the Ad Hoc Committee, one delegation suggested inserting the word "reasonably" before the word "likely".

[56] At the fourth session of the Ad Hoc Committee, one delegation suggested that repeated commission of the offence of the smuggling of migrants should be included as an aggravating circumstance.

[57] At the fourth session of the Ad Hoc Committee, some delegations drew attention to the fact that this subparagraph might overlap with provisions of the revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (A/AC.254/4/Add.3/Rev.2).

[58] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested inserting the words "and smuggling of" after the word "treatment", while other delegations opposed the insertion of those words.

[59] At the fourth session of the Ad Hoc Committee, Austria suggested including this wording as an option in the main body of the text, in order to combine paragraphs 5 and 6 of this article. At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested that the element of "exploitation" in option 1 should be included in option 2.

Option 1

7. A person whose illegal entry and/or illegal residence is procured or intended by the smuggling of migrants shall not become punishable under this Protocol.[60]

Option 2[61]

7. A person whose illegal entry and/or illegal residence is procured or intended by the smuggling of migrants shall not become punishable [under this Protocol].[62, 63]

7 *bis*. Nothing in this Protocol shall prevent a State Party from taking action against a person whose conduct constitutes an offence under [its domestic law or][64] any other provision on criminalization of this Protocol.

Article 5

Scope of application

1. This Protocol applies to the smuggling of migrants when committed in the context of organized crime as defined in article 2 of the Convention.[65]

[60] Some delegations expressed concern that this paragraph might interfere with the operation of national immigration laws. At the fourth session of the Ad Hoc Committee, several delegations stressed that, in their view, this provision was important and that all other provisions of the draft Protocol should therefore be consistent with this provision. It was emphasized that the goal of the Protocol would be to function as an instrument that would enable States to effectively prosecute smugglers. In this context, it was evident that criminalization of the migrant would not be intended or desirable. However, several delegations were apprehensive about the possibility of the Protocol granting immunity to illegal migrants, especially if they had committed a crime, including the smuggling of other illegal migrants.

[61] The text of this option was not discussed at the fourth session of the Ad Hoc Committee. However, there was extensive discussion of the subject among interested delegations, the results of which are reflected in the text and the relevant footnotes.

[62] Some delegations thought that reference to the Protocol would be inconsistent with the agreed intention of paragraph 7 *bis* of this option, which is to permit prosecution of those migrants who participated in criminal activities, such as the smuggling of migrants.

[63] At the informal consultations held during the fifth session of the Ad Hoc Committee, several delegations suggested replacing paragraph 7 with the proposal submitted by Canada (A/AC.254/L.59), which the United States amended by inserting "(a)" after the words "paragraph 1" and by inserting the words "or taking any other action against" after the word "prosecuting". Several other delegations supported the proposal submitted by France (A/AC.254/L.77). A proposal submitted by Morocco (A/AC.254/L.60) was also supported by several delegations.

[64] Some delegations considered this phrase to be inconsistent with the agreed intention of paragraph 7 of this option in that the phrase, according to their interpretation, would allow domestic legal provisions that criminalize illegal entry to override the Protocol caveat that migrants per se should not be subject to sanctioning.

[65] See footnote 11 above.

2. The provisions of this Protocol shall be without prejudice to the obligations of States Parties under the 1951 Convention[66] and the 1967 Protocol[67] relating to the Status of Refugees.[68]

Article 6

Jurisdiction[69]

1. Each State Party shall take legislative measures to establish its jurisdiction over the offences mentioned in article 4 of the present Protocol in accordance with article 9 of the Convention.

2. If more than one State Party intends to resume jurisdiction over an alleged offender in accordance with paragraph 1 of this article and with article 9 of the Convention, the States Parties concerned shall consult each other with a view to renouncing jurisdiction in order to render possible proceedings in the territory of the State Party most directly affected by the commission of the smuggling of migrants.[70]

II. Smuggling of migrants by sea[71]

Article 7

Cooperation and mutual assistance

1. States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in conformity with the international law of the sea and all generally accepted relevant international instruments.[72]

2. A State Party that has reasonable grounds to suspect that a vessel, which is flying its flag or claiming its registry, which is without nationality or which, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party

---

[66] United Nations, *Treaty Series*, vol. 189, No. 2545.

[67] Ibid., vol. 606, No. 8791.

[68] At the fourth session of the Ad Hoc Committee, some delegations suggested the inclusion in article 5 of a savings clause similar to that contained in article 15 of the revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Other delegations recommended placing such a savings clause at the end of this draft Protocol. One delegation suggested including the principle of non-refoulement in article 4. That delegation recalled that reference to humanitarian law was necessary.

[69] It is understood that the provisions on extradition, mutual legal assistance and other forms of international cooperation in criminal matters that would appear in the Convention would apply to the Protocol. In addition, it is understood that any provisions relating to human rights of detainees should be contained in the draft Convention. However, there is a need to review the question of whether any additional provisions would be necessary in view of the specific nature of the Protocol.

[70] Some delegations were of the view that this paragraph should be made consistent with article 9 of the draft Convention.

[71] In the previous version of the draft Protocol (A/AC.254/4/Add.1/Rev.2), this chapter included only one article (article 7). For the sake of clarity, the delegations of Austria and Italy proposed the structure included in the present version. With the exception of the titles of the articles and amendments to make references to paragraphs or articles consistent with the new proposed structure, no changes have been made to the text.

[72] The language of this provision has been derived from article 17, paragraph 1, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the 1988 Convention) and from paragraph 8 of the interim measures (MSC/Circ.896, annex).

concerned, is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance as is reasonable under the circumstances.[73]

Article 7 bis

Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State Party is engaged in the smuggling of migrants may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel.[74] The flag State may authorize the requesting State, *inter alia*:

(a) To board the vessel;

(b) To inspect the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants, to take appropriate action with respect to the vessel, persons and cargo on board, as authorized by the flag State.[75]

2. A State Party that has taken any action in accordance with paragraph 1 of this article shall promptly inform the flag State concerned of the results of that action.[76]

3. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made pursuant to paragraph 1 of this article.[77]

4. A flag State may, consistent with paragraph 1 of article 7, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken, including the use of force.[78] A State Party shall take no additional actions without the express authorization of the flag State, except those necessary to relieve imminent danger or those which follow from relevant bilateral or multilateral agreements.[79]

5. Each State Party shall designate an authority or, where necessary, authorities to receive reports of the smuggling of migrants and to respond to requests for assistance,

---

[73] The language of this provision has been derived from article 17, paragraph 2, of the 1988 Convention and from paragraph 11 of the interim measures (MSC/Circ.896, annex).

[74] The language of this provision has been derived from article 17, paragraph 3, of the 1988 Convention.

[75] The language of this provision has been derived from article 17, paragraph 4, of the 1988 Convention.

[76] The language of this provision has been derived from article 17, paragraph 8, of the 1988 Convention and from paragraph 12 of the interim measures (MSC/Circ.896, annex).

[77] The language of this provision has been derived from article 17, paragraph 7, of the 1988 Convention and from paragraph 14 of the interim measures (MSC/Circ.896, annex).

[78] The language of this provision has been derived from article 17, paragraph 6, of the 1988 Convention.

[79] The language of this provision has been derived from paragraph 13 of the interim measures (MSC/Circ.896, annex). Some delegations expressed concern that the exceptions did not cover all the operational scenarios that might arise.

confirmation of registry or the right of a vessel to fly its flag and authorization to take appropriate measures.[80]

6. When there are reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and it is concluded in accordance with the international law of the sea that the vessel is without nationality or has been assimilated to a vessel without nationality, States Parties shall conduct an inspection of the vessel, as necessary. If the results of the inspection indicate that the vessel is engaged in the smuggling of migrants, States Parties shall take appropriate measures in accordance with relevant domestic and international law.[81]

Article 7 ter

Safeguard clauses

1. When evidence exists that a vessel is engaged in the smuggling of migrants by sea, States Parties shall:

(a) Ensure the safety and the humanitarian handling of the persons on board and ensure that any actions taken with regard to the vessel are environmentally sound; and

(b) Take appropriate action in accordance with relevant domestic and international law.[82]

2. If any measures are taken against a vessel suspected of being engaged in the smuggling of migrants by sea, the State Party concerned shall take into account the need not to endanger the safety of human life at sea and the security of the vessel and the cargo or to prejudice the commercial and/or legal interests of the flag State or any other interested State.[83]

3. States Parties shall take, adopt or implement such measures in conformity with international law with due regard to:

(a) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel; and

(b) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.[84]

---

[80] The language of this provision has been derived from article 17, paragraph 7, of the 1988 Convention and from paragraph 21 of the interim measures (MSC/Circ.896, annex).

[81] The language of this provision has been derived from paragraph 16 of the interim measures (MSC/Circ.896, annex).

[82] The language of this provision has been derived from paragraph 17 of the interim measures (MSC/Circ.896, annex).

[83] The language of this provision has been derived from article 17, paragraph 5, of the 1988 Convention and from paragraph 7 of the interim measures (MSC/Circ.896, annex).

[84] The language of this provision has been derived from article 17, paragraph 11, of the 1988 Convention and from paragraph 6 of the interim measures (MSC/Circ.896, annex).

4. Any action taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.[85]

5. Measures taken, adopted or implemented pursuant to this Protocol shall be in conformity with the international law of the sea and all generally accepted relevant international instruments, such as the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto.[86]

Article 7 quater

Application

States Parties shall consider entering into bilateral or regional agreements to facilitate cooperation in applying appropriate, efficient and effective measures to prevent and suppress the smuggling of migrants by sea.[87] States Parties shall also encourage the conclusion of operational arrangements in relation to specific cases (ad hoc arrangements).[88]

III. Cooperation, prevention and other measures

Article 8

Compliance measures and arrangements

1. The Parties shall adopt every legislative and administrative measure needed in order to comply with the obligations deriving from this Protocol, having respect for the principles of sovereignty, territorial integrity and non-interference in internal affairs.

2. The Parties shall consider the conclusion of bilateral or regional agreements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent, combat and limit the illegal smuggling of migrants, in accordance with this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

Article 9

Additional legislative and administrative measures

States Parties shall take such additional legislative or other measures as they consider appropriate to prevent means of transportation operated by commercial carriers from being used in the commission of offences established under article 4 of this Protocol. Such measures shall include, in appropriate cases, fines and forfeiture to ensure that carriers,

---

[85] The language of this provision has been derived from article 17, paragraph 10, of the 1988 Convention and from paragraph 20 of the interim measures (MSC/Circ.896, annex).

[86] The language of this provision has been derived from paragraph 5 of the interim measures (MSC/Circ.896, annex).

[87] The language of this provision has been derived from article 17, paragraph 9, of the 1988 Convention and from paragraph 9 of the interim measures (MSC/Circ.896, annex).

[88] The language of this provision has been derived from paragraph 10 of the interim measures (MSC/Circ.896, annex).

including any transportation company, or the owner or operator of any vessel or vehicle, screen all passengers to see that they have valid passports and visas, if required, or any other documentation necessary for legal entry into the receiving State.

Article 10

Information

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the smuggling of migrants is a criminal activity frequently perpetrated by criminal organizations for profit and that it poses serious risks to the migrants involved.

2. Pursuant to article 22 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from becoming victims of criminal organizations.

3. Without prejudice to articles 19 and 20 of the Convention, States Parties shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, in conformity with their respective national laws and applicable treaties or arrangements, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known or suspected to be used by criminal organizations engaged in the smuggling of migrants;

(b) The identity and methods of organizations or criminal associations known or suspected to be engaged in the smuggling of migrants;

(c) The authenticity and proper form of travel documents issued by a State Party and advice concerning the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction, acquisition or other misuse of travel or identity documents used in the smuggling of migrants and ways of detecting them;

(e) Legislative experiences, practices and measures to prevent, combat and eradicate the smuggling of migrants; and

(f) Relevant scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the smuggling of migrants and to prosecute those involved.

Article 11

Prevention

1. Each State Party shall adopt such measures as may be necessary to detect and prevent the smuggling of migrants between its territory and that of other States Parties, by strengthening border controls, including by checking persons and travel or identity documents, and, where appropriate, by inspecting and seizing vehicles and vessels.

2. Without prejudice to article 19 of the Convention, States Parties shall consider intensifying cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

Article 12

Control of documents

1. States Parties shall adopt such measures as may be necessary to ensure that travel or identity documents issued by them are of such quality that they cannot readily be unlawfully altered, replicated, issued or otherwise misused.

2. Each State Party shall adopt such measures as may be necessary to ensure the integrity and to control the lawful creation, issuance, verification, use and acceptance of travel or identity documents issued by or on behalf of the State Party.

Article 13

Legitimacy and validity of documents

Each State Party shall, upon request by another State Party and subject to the domestic laws of the requested Party, verify without undue or unreasonable delay the legitimacy and validity of travel or identity documents issued in the name of the requested State Party and suspected of being used in the smuggling of migrants.

Article 14

Training

1. Each State Party shall provide or strengthen specialized training for immigration and other relevant officials in preventing the smuggling of migrants and in treating smuggled migrants.

2. States Parties shall cooperate with each other and with competent international organizations, as appropriate, to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the smuggling of migrants and to protect the rights of victims of such [smuggling] [trafficking] and illegal transport. Such training shall include, *inter alia*:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, especially relating to the identification of organizations or criminal associations known or suspected to be engaged in the smuggling of migrants, the methods used to transport smuggled migrants, the misuse of travel or identity documents for smuggling migrants and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for searching for and detecting, at conventional and non-conventional points of entry and exit, concealed, undocumented or improperly documented persons; and

(e) Recognizing the need to provide humane treatment to and protect the human rights of migrants.

3. Each State Party shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the smuggling of migrants. States Parties with relevant expertise should consider providing technical assistance to States that are frequently used as States of origin or as transit States for the smuggling of migrants.

[*Article 15*

Return of smuggled migrants

1. Each State Party agrees to facilitate and accept, without delay, the return of a person who has been smuggled contrary to the terms of this Protocol who is a national of that State Party or who had the right of abode in the territory of that State Party at the time of entry into the receiving State.

2. At the request of the receiving State Party, each State Party shall, without undue or unreasonable delay, verify whether a person who has been smuggled contrary to the terms of this Protocol is a national of the requested State Party.

3. In order to facilitate the return of a person smuggled contrary to the terms of this Protocol without proper documentation, the State Party of whom the person is a national or in which the person had the right of abode at the time of entry into the receiving State shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person's readmission into its territory.][89]

IV. Final provisions

Article 16

Implementation[90]

1. For the purpose of examining the progress made by the States Parties in achieving the implementation of the obligations undertaken in the present Protocol, the States Parties will provide periodic reports to the Conference of the Parties to the Convention.

2. The States Parties will provide such reports together with the reports submitted in accordance with article 23 of the Convention.

Article 17

Signature, accession, ratification and entry into force

1. This Protocol shall be open for signature, by any State that has signed the Convention, at United Nations Headquarters in New York until [...]. Thereafter, it shall be open for accession by any State Party to the Convention.

2. This Protocol shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

---

[89] This article was proposed by the delegation of the United States and supported by a number of other delegations. Many other delegations expressed concern about the issue of the return of migrants and about the compatibility of such a provision with human rights instruments, as well as about the potential implications of such a provision on extradition.

[90] One delegation proposed the deletion of this article because the issue of implementation and reporting requirements would be covered by the Convention.

3. This Protocol shall enter into force on the thirtieth day following the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. In the event that the deposit of the twentieth instrument of ratification, acceptance, approval or accession occurs prior to the entry into force of the Convention, this Protocol shall not enter into force until the entry into force of the Convention.

Article 18

Withdrawal

1. Any State Party may withdraw from this Protocol by written notification to the Secretary-General of the United Nations.

2. Withdrawal shall take effect twelve months after the date on which notification is received by the Secretary-General of the United Nations.

Article 19

Depositary

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.